UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 4:93CR14WC
PAUL B. CLARK,	)	
	)	Violation:
Defendant.	)	15 U.S.C. § 1

UNITED STATES' CONSOLIDATED RESPONSE
IN OPPOSITION TO DEFENDANT'S
MOTIONS FOR A CONTINUANCE AND DISCOVERY

On July 22, 1993, a federal grand jury in Jackson returned an indictment charging the defendant, Paul B. Clark, with participating in a conspiracy to rig bids for contracts to supply dairy products to certain public schools in Mississippi. Despite the fact that he will have had more than five full months since the grand jury's indictment to prepare for trial, defendant has moved for a continuance of "at least" thirty more days from this Court's specially set trial date of January 10, 1994. This is the defendant's second motion for a continuance in this case. His first asked the Court to specially set this matter for trial "in late November or early December 1993." The United States did not oppose the defendant's request for a continuance, and joined his motion for a special setting. The United States has prepared for trial in reliance on the defendant's commitment to the trial date that he requested the Court specially set.

Now, at the eleventh hour, after the United States has

subpoenaed its witnesses, some of whom live outside the State of Mississippi, and has asked them to arrange their January schedules around the trial, the defendant again comes before the Court and, making absolutely no showing that he has made any diligent effort to be ready to present his defense by January 10, asks the Court to delay this trial further. Defendant offers no sufficient justification for waiting until the eve of trial to ask the Court for more time to prepare. This case will be simple and straightforward. Every party in every criminal trial would like additional time to locate and interview additional witnesses. In every criminal trial, moreover, there is evidence that the opposing party does not learn about until the moment their adversary offers it at trial. Defendant has identified no specific documents that he needs and no witnesses he needs to find. Defendant's motion for a second continuance of this matter is entirely unwarranted. The Court should deny the motion, and the trial should begin, as scheduled, on January 10.

The United States has complied with its obligations under Fed. R. Crim. P. 16. In his motions for other material he claims is discoverable, the defendant has made no showing that he is entitled to such discovery. Indeed, he makes demands for material he clearly is <u>not</u> entitled to at this time. For example, for the defendant to move under Rule 16 for an order requiring the government to produce immediately all "prior

statements of government witnesses" suggests a wholesale disregard of the plain language of the Federal Rules of Criminal Procedure, the Jencks Act, and the Standing Discovery Order in this case. Defendant's Fed. R. Crim. P. 17(c) motion for the pretrial production of documentary evidence is equally inappropriate, and is a vague and generalized demand for discovery that makes no attempt to satisfy the clear requirements of a proper Rule 17(c) request. The Court should deny both of defendant's discovery motions.

BACKGROUND

Procedural History

(1) On June 11, 1990, the State of Mississippi filed a complaint charging certain dairy companies and individuals with rigging bids submitted to public schools in Mississippi. The complaint named as defendants four dairy companies and several individuals. The corporate defendants included Flav-O-Rich, Inc. ("Flav-O-Rich"), the company for whom the defendant worked. Defendant was not named as an individual defendant.

(2) On April 16, 1991, the State of Mississippi filed a motion for leave to file its third amended complaint. In the motion, the State explained as its need to amend that "[s]ince the original filing of this action, the Plaintiff has discovered additional evidence concerning the involvement of additional parties [in] the conduct, transactions and occurrences alleged in

the original, First Amended and Second Amended Complaints." Paragraph 7 of the proposed amended complaint added Paul Clark as a defendant in the bid-rigging lawsuit. Paragraph 7 alleged, among other things, that "Clark personally engaged in anticompetitive activities related to . . . sales efforts." The proposed amended complaint, however, erroneously alleged that Clark resided in Mississippi, and when the amended complaint was filed, Clark was not among the named defendants.

(3) A federal grand jury in the Southern District of Mississippi also investigated the fraudulent conduct of dairy companies and their representatives in Mississippi. The defendant's former employer, Flav-O-Rich, pled guilty to a criminal information filed in the Southern District of Mississippi on September 29, 1992. Subsequent to Flav-O-Rich's guilty plea, the following companies and individuals pled guilty to criminal informations charging them with rigging dairy bids submitted to public schools in Mississippi: Dairy Fresh Corp. ("Dairy Fresh") and three of its employees, Willie Erwin Burt, J.R. Dickinson, and Pat Miles; and Borden, Inc. ("Borden") and two of its employees, M. K. Ethridge and Jack Vance.

(4) From at least as early as February 1993, the defendant's current counsel has represented him in connection with the grand jury's investigation of the bid-rigging scheme. Beginning as early as spring, counsel for the defendant attended some of the

sentencing hearings of the defendant's coconspirators. During this time, defense counsel obtained from the defendant's former counsel sworn statements given to the State by Messrs. Miles and Dickinson of Dairy Fresh and Ken Little of Flav-O-Rich. In early summer, counsel for the defendant was informed that the Antitrust Division staff investigating the case was preparing a recommendation that the grand jury be presented with a proposed indictment of his client. Following the practice of the Antitrust Division, staff offered defense counsel the opportunity to present his arguments as to why his client should not be indicted. He took the opportunity and argued that Clark should not be indicted because he was not a defendant in the civil case; counsel also discussed alleged weaknesses in certain witnesses' anticipated testimony and in certain bid documents. In short, it was clear that defense counsel was very much aware of the progress of the investigation and understood the nature of the anticipated charges against his client.

(5) On July 22, 1993, a federal grand jury in the Southern District of Mississippi returned an indictment charging the defendant with participating in a conspiracy to rig bids submitted to school districts for contracts to supply dairy products, in violation of the Sherman Act, 15 U.S.C. § 1. The defendant, on that day, was thus in a position to begin serious preparations for a trial of this case.

(6) On July 30, 1993, the defendant entered a plea of not guilty to the charged offense. The same day, the case was set for trial on October 12, 1993, before United States District Judge Henry T. Wingate.

(7) On August 27, 1993, the defendant, citing trials involving his counsel in September and in early November 1993, moved for a continuance of the trial from its originally scheduled date of October 12. A copy of that motion is attached. 1/ Defendant also requested that the Court specially set the trial of this case to begin in late November or early December 1993, a request with which the United States joined. The United States did not oppose the defendant's first motion for a continuance because the defendant agreed to request a specially set trial date. On September 3, 1993, this Court specially set trial to begin on January 10, 1994, several weeks past the time the defendant said he would be prepared to begin trial.

(8) On September 1, 1993, defense counsel came to the Antitrust Division's Atlanta Office and inspected the Rule 16 documents in the possession of the United States. This production included documents produced to a federal grand jury in the Southern District of Mississippi, as well as all bid files obtained by the State of Mississippi in its investigation

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1/ In his first continuance motion, defense counsel cited his involvement in other trials during September and November as a ground for rescheduling the trial from October 12, 1993. In

moving to delay the trial yet again, this time from January 10, 1994, counsel again cites his involvement in those same trials. of bid rigging by dairies in the State. The defendant had the opportunity to make copies of any documents he wished.

(9) On September 14, 1993, the United States disclosed voluntarily to defense counsel the counties in eastern Mississippi in which school boards were victims of the charged conspiracy. In the same letter, counsel for the United States stated that the evidence would show that the defendant joined the conspiracy in the spring of 1985, and that under the agreement, his company, Flav-O-Rich, was the successful bidder for contracts to supply milk to the Gulfport city schools, the Laurel city schools, the Marion County schools, and the Ocean Springs city schools. On October 15, 1993, in a Bill of Particulars, the United States listed the names and addresses of each school district to which rigged bids were submitted, described the first overt act committed by the defendant in furtherance of the conspiracy, and described the last act in furtherance of the conspiracy. Finally, in a letter attached to the Bill of Particulars, the United States described how the charged fraudulent conduct operated.

(10) Not until December 6 and 7 did defense counsel make a second trip to Atlanta to inspect the Rule 16 documents. At that time, he copied more of those documents.

(11) Although the Standing Discovery Order does not call for

the reciprocal exchange of witness statements until five days before trial, counsel for the United States offered to provide to the defendant, by December 1, 1993, all Jencks Act statements in its possession made by witnesses the government intends to call in its case-in-chief, including statements certain witnesses made to the State of Mississippi during the State's investigation. In exchange, counsel for the United States asked defense counsel to negotiate a trial document stipulation and to agree to refrain from asking for a continuance of the January 10 trial date once the United States disclosed the Jencks material. During these discussions in late November, counsel for both the United States and the defendant were able to agree on a stipulation regarding interstate commerce facts and the authenticity and non-hearsay nature of certain documents. However, the defendant would not agree, as a condition of the early Jencks production, to refrain from asking for another continuance of the specially set trial date.

DISCUSSION

The Defendant Should Not Be Given a Second Continuance

The defendant has moved for a continuance of the trial from the specially set date of January 10, 1994, because, he alleges, he needs "time to locate and interview witnesses, including newly discovered witnesses, to obtain by pretrial subpoenas newly discovered documents and to locate witnesses who may be able to

testify regarding the information contained in documents which the United States has recently advised was lost or destroyed." None of the defendant's stated reasons for requesting another continuance warrant his obtaining one.

Distilled, the defendant's argument that witnesses are "unavailable" to him is this: the Department of Justice was "simultaneously conducting a grand jury investigation regarding possible obstruction charges during the time that the Defendant was seeking to obtain witness interviews"; that "during the time the Defendant was attempting to interview material witnesses, some of these witnesses were being directed to appear before government attorneys in Atlanta"; and that "[s]everal material witnesses have refused to discuss this matter until they had completed their grand jury appearance." The obvious inference to be drawn from these statements is that the United States has manipulated the grand jury process and interfered with the defendant's ability to interview witnesses. These charges are serious and untrue. The grand jury is properly conducting a legitimate investigation of possible obstruction of justice. Should the Court have any questions about the status of that investigation, counsel for the United States will advise the Court in camera. No witness was ever "directed" to meet with government attorneys in Atlanta for the purpose of interfering with the defendant's ability to interview the witness.

Furthermore, it is nonsensical that an individual would have to wait until he or she "completed their grand jury appearance" before agreeing to be interviewed by defense counsel. Besides, the grand jury has not met on the obstruction of justice investigation since late summer.

The defendant's stated grounds for a continuance because of destroyed Flav-O-Rich documents and his need to interview witnesses about the destruction of documents are confusing. The fact that documents are missing may deprive both the United States and the defendant of documents each wants in presenting their cases to the jury. Given that the United States carries the burden of proof, lost documentary evidence arguably falls most heavily on the prosecution's case. More importantly, there is no logical relationship between destroyed documents and the defendant's need for a continuance. Destroyed documents will continue to be non-existent thirty days hence.

The defendant also offers no explanation for his not having learned of the document destruction until three weeks into December, three weeks before trial. There is a core of Flav-O-Rich employees with knowledge of what documents the company maintains. Once the defendant was indicted in July, a logical starting point for the preparation of his defense would have been to ask Flav-O-Rich counsel or company employees about the existence of all material Flav-O-Rich documents. It is

troubling that at this late date, the defendant raises these claims to the Court, knowing that the Court has specially set the trial date.

The United States is prepared to go to trial on January 10, 1994. It has subpoenaed its witnesses and has asked each of them to arrange their schedules for mid-January in accordance with their appearances at trial. As defense counsel has known for some time, counsel and staff for the United States have made extensive preparations in order to travel to Jackson for the January 10 trial. The defendant has offered no acceptable reason to show why he needs more than five and a half months to prepare for this trial.

The Defendant is Not Entitled to Further Discovery Under Fed. R. Crim. P. 16

The United States has complied fully with its obligations under Fed. R. Crim. P. 16 and the Court's Discovery Order. Conversely, the defendant has not provided the United States with one shred of reciprocal discovery. Not only has defendant made no showing that he is entitled to any other documents -- other than his bare assertions that information such as corporate tax returns are, in some free-floating way, "material and important" to his defense -- he confuses, or ignores, the requirements of Rule 16 as distinguished from the government's obligations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the Jencks Act, 18 U.S.C. § 3500, and Giglio v. United States, 405 U.S. 150,

92 S.Ct. 763 (1972).

The United States will disclose to the defendant all Jencks Act statements made by individuals whom the United States intends to call at trial when it fulfills its Jencks Act obligations. Under the Standing Order, that will occur five days prior to trial. A Jencks Act request is "wholly inappropriate" in a Rule 16 motion. United States v. Harris, 458 F.2d 670, 679 (5th Cir.), cert. denied, 409 U.S. 888 (1972).

The defendant also has asked the Court to order the United States to produce all information regarding immunity or settlement agreements between individuals and/or companies and the State of Mississippi. The defendant, in other words, is asking that the United States disclose immediately all Giglio material in its possession. This is not a proper Rule 16 request. The United States will disclose any impeaching material it has at the proper time, which, under the Standing Order, is five days before trial.

The defendant also seeks documents which he believes were subpoenaed by other grand juries. Specifically, he asks for personnel records of employees of Borden and of Dairy Fresh, and for financial documents, including tax returns, of the two companies. The defendant has made absolutely no showing that these documents will be material to his defense. If the United States intends to introduce such documents in its case-in-chief,

it will certainly provide them to the defendant.

The defendant's motion to issue a Rule 17(c) subpoena is equally defective in its lack of specificity and its transparency as an improper discovery device. The defendant is has not made a minimal showing of relevancy, admissibility, and specificity in his motion. See United States v. Nixon, 418 U.S. 683, 700, 94 S.Ct. 3090, 3103 (1974). Rule 17(c) is not a discovery tool, nor does it allow "a blind fishing expedition seeking unknown evidence." United States v. MacKey, 647 F.2d 898, 901 (5th Cir. 1981). That is precisely how the defendant proposes to use the Rule, however.

Conclusion

This case is about straightforward fraud. The United States will call less than ten substantive witnesses; we expect the defendant will call even fewer witnesses. The defendant has not demonstrated that, five months full months after the grand jury returned the indictment, he is entitled to a second continuance. He has had more than ample time to interview, several times over, every witness who is willing to talk to him. Witnesses who do not wish to speak to him have no obligation to do so, anymore than the defendant has a right to interview witnesses pretrial.

For the reasons stated herein, the United States urges the Court to deny defendant's motions for a continuance and for

discovery.

Respectfully submitted,

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